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IN THE

Supreme Court of the United States

October Term, 1957.

No. 853

FRANK W. BABCOCK,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

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On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the order of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered on November 19, 1957, be affirmed, and/or that the appeal taken therefrom to this Court be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a final order entered on November 19, 1957, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified complaint, filed in the Municipal Court of Los Angeles Judicial District, with having committed a violation of Section 24242 of the Health and Safety Code of the State of California. The complaint alleged that appellant

> "did wilfully and unlawfully, at 501 South Los Angeles Street, in the City of Los Angeles, discharge into the atmosphere from a single source of emission . . . an air contaminant for a period aggregating more than three minutes in any one hour, which contaminant was then and there: (a) as dark and darker in shade as that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines; and (b) of such opacity as to obscure the observer's view to a degree equal to and greater than does smoke described in (a) above."

The cause was submitted to the trial court on the officer's report together with the Ringelmann Chart. Appellant was found guilty and an appeal was duly taken to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matter was submitted and thereafter the order granting probation was affirmed without opinion. A petition for rehearing was filed and denied. A notice of appeal to this court was thereafter presented.

ARGUMENT.

I.

The Decision of the Appellate Department of the Superior Court Is Plainly Correct.

The leading case in the United States on the constitutional limitations on smoke abatement laws is *Northwestern Laundry v. Des Moines*, 239 U. S. 486, 36 S. Ct. 206, 60 L. ed. 396. This court, in affirming the decision of the District Court, stated as follows:

> "So far as the Federal Constitution is concerned, we have no doubt the state may by itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance. Recent cases in this court are *Reinman v. Little Rock*, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511; *Chicago & A. R. Co. v. Tranberger*, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; *Hadacheck v. Sebastian*, decided December 20th, 1915 [239 U. S. 394, *ante*, 348, 36 Sup. Ct. Rep. 143].
>
> "That such emission of smoke is within the regulatory power of the state has been often affirmed by state courts. (cases cited.)"

In *Moses v. United States*, 16 App. D. C. 428, 50 L. R. A. 532, involving an Act of Congress for the District of Columbia on the subject of smoke, it was stated

that the only inhibition on the states is that the classification of the persons and things shall not be arbitrary. If there be some reasonable basis for the classification made, it is not obnoxious to the charge of denial of equality.

The Appellate Department of the Superior Court in the case of *People v. International Steel Corp.*, 102 Cal. App. 2d Supp. 935, upheld this statute against constitutional attack, stating:

> ". . . We have concluded that the control of 'smog' is a proper subject of the police power, that the prohibitions of the statute herein mentioned violate none of the constitutional provisions referred to. . . .
>
> "The general purpose of the law above mentioned, as appears from sections 24198 and 24199 of the Health and Safety Code, is to reduce air contamination where it exists, 'in order to safeguard life, health, property and the public welfare and to make possible the comfortable enjoyment of life and property.'"

The appellate court again upheld this statute against constitutional attack in the case of *People v. Plywood Manufacturers of California, etc.*, 137 Cal. App. 2d Supp. 859, appeal dismissed 76 S. Ct. 787, 351 U. S. 929, 100 L. ed. 1458, rehearing denied 76 S. Ct. 1046, 351 U. S. 990, 100 L. ed. 1503.

The sole ground of appeal is:

Whether a state of the United States may, consistent with the Fourteenth Amendment to the Constitution of the United States, prohibit the commission of a certain act within two designated areas within the State, but provide that only persons committing the act within one of such areas shall be subject to fine and imprisonment; or,

does such action by the State deny to those persons so subject to fine and imprisonment the equal protection of the laws.

A statute adopted under the police power is general and constitutional when it applies uniform rules of conduct for all those coming within the scope of its application and may not be challenged because of any denial of "equal protection of the law" to those on whom it operates because others differently situated and within a different legal classification may not be affected by its terms.

People v. Sullivan (1943), 60 Cal. App. 2d 539.

The constitutional guarantee of equal protection of the laws does not require territorial uniformity.

Ocampo v. United States, 234 U. S. 91, 34 S. Ct. 712, 58 L. ed. 1231

The equal protection clause of the Fourteenth Amendment relates to equality between persons in a state, not between areas in a state.

Salsbury v. Maryland, 346 U. S. 545, 74 S. Ct. 280, 98 L. ed. 281.

There is no violation of equal protection where legislative discrimination reflects the fact, or legislative belief, that evils in the same field are of different dimensions and proportions, requiring different remedies, or when the discrimination occurs as a consequence of reformative legislation which takes one step at a time and addresses itself to the phase of the problem which seems most acute to the legislative mind.

Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 75 S. Ct. 461, 99 L. ed. 563.

The legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied.

West Coast Hotel v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703.

While the Constitution, in enjoining the legal protection of the laws upon states, precludes irrational discrimination as between persons or groups of persons in the incidence of a law, it does not require situations which are different in fact or opinion to be treated in law as though they were the same.

Goesaert v. Cleary, 335 U. S. 464, 69 S. Ct. 198, 93 L. ed. 163.

The deference due to the judgment of a state legislature on the matter of statutory classification alleged to deny equal protection of the laws, is especially to be observed when local conditions which the court cannot know may affect the answer to the crucial question of whether the court can say, on its judicial knowledge, that the legislature could not have had any reasonable ground for believing there were such public considerations as to justify the distinction made.

Dominion Hotel v. State of Arizona, 249 U. S. 265, 39 S. Ct. 273, 63 L. ed. 597.

It is clearly apparent that the California legislature did find that the problems of air pollution in the San Francisco Bay area were of a special nature by reason of the geographical location and weather conditions (Sec. 24346.2, California Health and Safety Code, Appellant's Jurisdictional Statement, Appendix p. 26). Thus the legislature could also find that criminal punishment was unnecessary.

II.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

The record and Appellant's Jurisdictional Statement show that no opinion was delivered by the Appellate Department of the Superior Court of Los Angeles County. [R. 13; Jurisdictional Statement, pp. 16, 17.]

In *Stembridge v. State of Georgia*, 343 U. S. 541, 72 S. Ct. 834, 96 L. ed. 1130, it was held that where the highest court of the state delivers no opinion and that it appears the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment.

Appellant's case in the trial court was submitted on the officer's report together with the Ringelmann Chart [R. 3; Jurisdictional Statement, p. 4]. Appellant's Jurisdictional Statement (pp. 4, 5) does not indicate the raising of a federal question in such court of first instance.

The minutes of the trial court indicate appellant did not avail himself of the opportunity to raise a federal question at the trial level by demurrer to the complaint under Section 1004 of the California Penal Code (App. p. 1). Such minutes do not indicate the raising of a federal question during the course of the trial nor in an available motion in arrest of judgment under Section 1185 of the California Penal Code (App. p. 1).

It is a general rule of California appellate review, early established and long adhered-to, that questions not raised in the trial court will not be considered on appeal.

People v. Alvidrez, 158 A. C. A. 317, 319;

MacKenzie v. Angle, 82 Cal. App. 2d 254, 263.

On the trial court record under such rule the appellate court could have affirmed the order of the trial court on an adequate state ground. Furthermore, the statute under which appellant was charged and convicted is clearly a general law having uniform application. The various sections of the California Health and Safety Code relating to the Bay Area Air Pollution Control District, to which appellant has referred, are conceivably "special laws" and could be held to be in violation of Article IV, Section 25 of the California Constitution (App. p. 2). Such reasoning by the appellate court would clearly lead to a judgment on non-federal grounds.

In that the Appellate Department of the Superior Court delivered no opinion and its decision might have rested on either of two adequate state grounds, under *Stembridge v. Georgia*, *supra*, this court should decline jurisdiction.

Appellee urges, therefore, that the appellant presents no substantial question for the decision of this court; that the order sought to be appealed from should be affirmed and/or the appeal dismissed.

Respectfully submitted,

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APPENDIX.

Stats. 1951, c. 1674, p. 3841 (Penal Code, Section 1004)

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;

3. That more than one offense is charged, except as provided in Section 954;

4. That the facts stated do not constitute a public offense;

5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

Stats. 1951, c. 1674, p. 3851 (Penal Code, Section 1185)

A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea, finding, or verdict of guilty, or on a finding or verdict against the defendant, on a plea of a former conviction, former acquittal or once in jeopardy. It may be founded on any of the defects in the accusatory pleading mentioned in Section 1004, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced. When determined, the order must be immediately entered in the minutes.

Stats. 1955, Vol. I, p. XXIII (California Constitution, Article IV, Section 25)

Local or special laws.

Sec. 25. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

First—Regulating the jurisdiction and duties of justices of the peace, police judges, and of constables.

Second—For the punishment of crimes and misdemeanors.

Third—Regulating the practice of courts of justice.

Fourth—Providing for changing the venue in civil or criminal actions.

Fifth—Granting divorces.

Sixth—Changing the names of persons or places.

Seventh—Authorizing the laying out, opening, altering, maintaining, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, graveyards, or public grounds not owned by the State.

Eighth—Summoning and impaneling grand and petit juries, and providing for their compensation.

Ninth—Regulating county and township business, or the election of county and township officers.

Tenth—For the assessment or collection of taxes.

Eleventh—Providing for conducting elections, or designating the places of voting, except on the organization of new counties.

Twelfth—Affecting estates of deceased persons, minors or other persons under legal disabilities.

Thirteenth—Extending the time for the collection of taxes.

Fourteenth—Giving effect to invalid deeds, wills, or other instruments.

Fifteenth—Refunding money paid into the State Treasury.

Sixteenth—Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this State, or to any municipal corporation therein.

Seventeenth—Declaring any person of age, or authorizing any minor to sell, lease, or incumber his or her property.

Eighteenth—Legalizing, except as against the State, the unauthorized or invalid act of any officer.

Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

Twentieth—Exempting property from taxation.

Twenty-first—Changing county seats.

Twenty-second—Restoring to citizenship persons convicted of infamous crimes.

Twenty-third—Regulating the rate of interest on money.

Twenty-fourth—Authorizing the creation, extension, or impairing of liens.

Twenty-fifth—Chartering or licensing ferries, bridges, or roads.

Twenty sixth—Remitting fines, penalties, or forfeitures.

Twenty-seventh—Providing for the management of common schools.

Twenty-eighth—Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts.

Twenty-ninth—Affecting the fees or salary of any officer.

Thirtieth—Changing the law of descent or succession.

Thirty-first—Authorizing the adoption or legitimation of children.

Thirty-second—For limitation of civil or criminal actions.

Thirty-third—In all other cases where a general law can be made applicable.